88-1987

Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

ROBERT PETER ZOOK, JR.,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When an accused makes an ambiguous or equivocal request for counsel may a police officer ask clarifying questions to determine the accused's desires respecting counsel and the continuation of the questioning.

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FEDERAL STATUTES:

28 U.S.C. 1257 (a) 1

The Commonwealth of Pennsylvania, Petitioner, requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania, entered on February 2, and April 13, 1989.

OPINIONS BELOW

The Supreme Court of Pennsylvania entered an order reversing the judgement of sentence of the Court of Common Pleas of Lancaster County and granted respondent a new trial. That case is reported at ___ Pa. ___, 553 A.2d 920 (1988), a reproduced copy of the opinion is set forth in the Appendix to this petition beginning with App. 3.

A petition for reargument was denied in a per curiam memorandum, that order is reported at ___ Pa. ___, ___ A.2d ___ (1989); reproduced at App. 1.

The Court of Common Pleas of Lancaster County also issued an opinion which is unreported. It is reproduced beginning at App. 13.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgement of the Supreme Court of Pennsylvania sought to be reviewed is February 2, 1989.

The date of the Order denying a rehearing in the Supreme Court of Pennsylvania is April 13, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On July 24, 1985, the Lancaster City Police Department discovered the bodies of Paul Conard and Sandy Wiker. They had been stabbed and strangled to death

sometime in the evening of July 23, or early morning of July 24, 1985.

Robert Zook, the respondent, was subsequently arrested for this offense on July 26, 1985, at approximately 6:23 a.m. At 9:25 a.m. on the same date he was given his *Miranda* warnings and gave an explicit written waiver of his rights and agreed to talk to Lt. Landis of the Lancaster City Police Department. Approximately two-thirds of the way into the interview Zook asked to use the phone to call his mother to see if she could get him an attorney. At that point Lt. Landis asked Zook if this meant that he wanted the questioning stopped until he had an attorney present. Zook responded no and told Lt. Landis to go ahead and finish what he was doing. The interview continued and was subsequently terminated by Lt. Landis.

On January 13 – 15, 1986, a hearing on a motion to suppress evidence, including the statements made to Lt. Landis, was held. The Trial Judge ruled the statements admissable and on this particular issue found that Zook did not invoke his right to have an attorney present during questioning.

On March 10, 1986, trial commenced and during the trial the Commonwealth introduced into evidence the statements made by Zook. On March 19, 1986, a jury found him guilty of murder in the first degree, and after a sentencing hearing sentenced him to death.

On February 2, 1989, the Supreme Court of Pennsylvania in a four-to-three decision reversed the judgement

of sentence and ordered a new trial.[1] The Court ruled that the above interchange between Zook and Lt. Landis violated his rights under *Miranda v. Arizona* and *Edwards v. Arizona*.

On April 13, 1989, the Commonwealth's Petition For Reargument was denied.

REASON FOR GRANTING THE WRIT

This case is in a posture to answer the question specifically left open in *Smith v. Illinois*, 469 U.S. 91, 83 L.Ed.2d 488, 105 S.Ct. 490 (1984), and *Connecticut v. Barrett*, 479 U.S. 523, 93 L.Ed.2d 920, 107 S.Ct. 828 (1987). In *Smith v. Illinois*, this Court held that an unambiguous request for counsel could not be vitiated by further questioning intended to cast doubt on the initial request. In *Connecticut v. Barrett*, the Court held that a suspect's statement that he would not make a written statement without the presence of counsel, but had "no problem" talking about the incident, did not render a subsequent oral statement constitutionally infirm. These cases, however, did not resolve the conflict among the courts as to what standards should be applied for determining the consequences of an accused's ambiguous or equivocal

[1] On the same date the court, again by a vote of four-to-three, granted a new trial in the case of *Commonwealth v. Gibbs*, ___ Pa. ___, 533 A.2d 409 (1989), holding that once a suspect made an equivocal reference to counsel, the police were precluded from responding to his subsequent inquiry, "what good will it do me if I say anything?" (A petition for certiorari is pending in *Gibbs*).

request for counsel pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 865 S.Ct. 1602 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880, (1981) Certiorari should be granted in this case to resolve that significant issue.

Respondent Zook was arrested at 6:36 a.m. on July 26, 1985. At 9:52 a.m. on the same day he was questioned by Lt. Michael Landis of the Lancaster, Pennsylvania Police Department. Respondent was given a complete set of *Miranda* warnings by Lt. Landis and acknowledged in writing having received and understood those warnings. He then explicitly waived his rights and agreed to speak to the police without an attorney being requested. Testimony on Zook's Motion To Suppress Evidence produced the following from Lt. Landis' direct testimony:

Q During the interview, did Mr. Zook ever request an attorney?

A Approximately – I don't know, two-thirds of the way into the interview, something like that, right around the time we got though talking about whether he knew Conard or Wiker, he asked if he could use the phone to call his mother to see if she could get him an attorney. And at that point, I said are you saying you want us to stop questioning you until you have an attorney present? And he said no, go ahead and finish with what you are doing. That was the only time that he came close to asking for an attorney, if that's what that was.

Q And at no point during the interview did he ever say he didn't want to answer any questions at all?

A At the very end, that may be what terminated it. I can't recall.

Q But if he did state that, then you would have honored his request, is that correct?

A Yes.

The Supreme Court of Pennsylvania in a four-to-three decision reversed respondent's first degree murder conviction for which a sentence of death was imposed, based upon its misinterpretation of *Edwards v. Arizona*.

The rule of *Edwards v. Arizona*, however, applies only in those situations where the request for counsel has been clearly asserted. *Smith v. Illinois, supra*. The facts in the instant case concern the threshold question of whether or not respondent invoked his right to counsel in the first instance. It is clear that he did not. First, he did not request the police to stop questioning him or request an attorney; he merely asked to use the phone. Second, he did not ask to use the phone to call an attorney, he asked to use it to call his mother. Third, he wanted to call his mother not to tell her he wanted an attorney, but only to see if she could get him an attorney. Fourth, it is unclear whether he was talking about obtaining an attorney to be present during questioning, or wanted to make arrangements for representation at later proceedings on the offenses for which he had been arrested. Fifth, the officer's response to respondent's ambiguous reference to counsel was not continued interrogation, but a totally noncoercive attempt to clarify respondent's wishes; the officer asked, "Are you saying you want us to stop questioning you until you have an attorney present?"

Respondent replied, "No, go ahead and finish with what you are doing."

Thus respondent's reference regarding an attorney, was far from the clear assertion of the right as contemplated by *Miranda v. Arizona, supra., Edwards v. Arizona, supra.,* and *Smith v. Illinois, supra.* This is in fact the ambiguous or equivocal assertion contemplated by *Smith v. Illinois.* Given this ambiguous assertion review of this case will permit this Court to set the standard for determining the consequences of the ambiguity. What happened in this case was a natural reaction of a police officer, or in fact of anyone, in that he sought to clarify the ambiguity.

The Pennsylvania Supreme Court implicitly followed one of two minority rules that all questioning must cease upon any request for, or reference to counsel, however equivocal or ambiguous. [See also *People v. Superior Court,* 15 Cal. 3d 729, 542 P.2d 1390 (1976), *Ochoa v. State,* 573 S.W.2d 796 (Tex. Crim. App. 1978)]. However, this minority rule is a totally unwarranted expansion of the *Edwards* doctrine.

Another minority view states that an ambiguous or equivocal request is not an assertion of the right and questioning may continue. See e.g. *People v. Kendricks,* 121 Ill. App. 3d 442, 77 Ill. Dec. 41, 459 N.Ed.2d 1137 (1984).

The majority rule, which should be adopted by this Court, makes the most sense in dealing with an ambiguous request; it permits police officers to clarify the request before continuing or ceasing the questioning. See *State v. Wilson,* 199 Conn. 417, 507 A.2d 1367 (1986), *State v. Wright,* 97 N.J. 113, 477 A.2d 1269 (1984), *Long v. State,*

517 So.2d 664 (Fla. 1987), *Hall v. State*, 255 Ga. 256, 335 S.E.2d 812 (1985), *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074 (1983), *Sleek v. State*, 499 N.E.2d 751 (Ind. 1986), *State v. Robinson*, 427 N.W.2d 217 (Minn. 1988), *Sechrest v. State*, 101 Nev. 360, 705 P.2d 626 (1985), *State v. Griffin*, 754 P.2d 965 (Utah App. 1988), *State v. Robtoy*, 98 Wash. 2d 30, 653 P.2d 284 (1982), *Cheatham v. State*, 719 P.2d 612 (Wyo. 1986), *Ruffin v. United States*, 524 A.2d 683 (D.C. App. 1987), *United States v. Cherry*, 733 F.2d 1124 (5th Cir. 1984); *United States v. Riggs*, 537 F.2d 1219 (4th Cir. 1976). *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979).

This court should use the case, and the related *Gibbs* case, to resolve the split in authority as to what rule should be used in determining the consequences of such an equivocal or ambiguous request. Thus, this petition should be granted to resolve the conflicts.

CONCLUSION

For the above reasons this Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Joseph C. Madenspacher
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(SEAL)

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

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April 17, 1989

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RE: *Commonwealth of Pennsylvania v. Robert Peter Zook, Jr., Appellant* NO. 37 E.D. APPEAL DOCKET 1987

Dear Mr. Kenderdine:

This is to advise you that the following Order has been endorsed on your Petition for Reargument, filed in the above captioned matter:

"April 13, 1989.

Petition Denied.

Per Curiam."

Mr. Justice Larsen would grant reargument.

Very truly yours,

/s/ Marlene F. Lachman
MARLENE R. LACHMAN,
ESQUIRE
Prothonotary

/pj
cc: James P. Cullen, Esquire
Vincent J. Quinn, Esquire
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West Publishing Company

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

Commonwealth of Pennsylvania	:	No. 37 E.D. Appeal Docket 1987
v.	:	
Robert Peter Zook, Jr., Appellant	:	
	:	
	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that Appellant's request for a new trial is granted.

/s/ Marlene F. Lachman
Marlene F. Lachman, Esq.
Prothonotary

Dated: February 2, 1989

J-141-1988

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 37 E.D. Appeal Docket 1987
Appellee	: Appeal from the Judgment of Sentence of the Court of Common Pleas of Lancaster County, Criminal Division, No. 1700 of 1985, Entered on February 19, 1987.
v.	
ROBERT PETER ZOOK, JR.,	
Appellant	
	: RE-ARGUED: September 26, 1988

OPINION OF THE COURT

MR. JUSTICE PAPADAKOS Filed: February 2, 1989

Appellant, Robert Peter Zook, Jr., was found guilty by a jury of two counts of first degree murder for the killings of Paul Conard and Sandra Wiker. A sentencing hearing was held as required by 42 Pa.C.S. §9711[1] and the jury determined that Appellant receive two sentences of death, one for each of the two murders. This case is now

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[1] 42 Pa.C.S. §9711(a)(1) provides:

(a) Procedure in jury trials –

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

before us on automatic appeal from the Court of Common Pleas of Lancaster County pursuant to 42 Pa.C.S. §9711(h)(1).[2] Appellant alleges that twenty-five errors occurred below, nineteen at trial and six during the sentencing phase. On one issue, we conclude that Appellant's right to request an attorney under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *reh'g. denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), was impaired by the authorities and, hence, that his subsequent statements were admitted into evidence improperly. For this reason, Appellant's request for a new trial must be granted. The remaining allegations of error need not be addressed.

Based on our review of the evidence, viewed in a light most favorable to the Commonwealth, the facts are these. On July 24, 1985, the bodies of Paul Conard and Sandra Wiker were discovered at 868 North Queen Street in Lancaster. The murders were very brutal, with both bodies having been stabbed, strangled, bound and gagged.

On the morning of Friday, July 26, 1985, several detectives of the Lancaster Police Department, along with the District Attorney, interviewed Marcellus Barnett and Timi Buterbaugh concerning information they possessed about the Conard-Wiker murders. The two individuals

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[2] 42 Pa.C.S. §9711(h) provides:

(h) Review of death sentence. –

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

had arrived at the police station earlier in the evening and were questioned until about 1:00 or 1:30 a.m. Barnett told the police about his involvement in giving Appellant the layout of Conard's apartment and other information possibly linking Appellant to the murders. Barnett also related to the police that the Appellant came to see him after the murders and told him that he, the Appellant, and his confederates had forced their way into Conard's house by gunpoint, had tied up both Conard and Wiker, stabbed them, took guns and money, and left.

Barnett further stated that he believed that Appellant was staying at the Parkside Motel under an assumed name and that he was probably armed. (N.T., Pre-Trial Hearing, pp. 199-200, 219-224.) The police decided to place a stakeout at the motel in the event Appellant attempted to leave. Two police officers were sent to the motel at 3:00 a.m., were advised of the situation and were instructed not to do anything unless it appeared that Appellant was attempting to leave. The officers were informed that Appellant might be armed and dangerous. Appellant had registered at the Parkside Hotel on July 25, 1985, under the assumed name of James Long. At 6:26 a.m., July 26, 1985, Appellant left his motel room, and pursuant to their instructions, the police officers placed him under arrest. Appellant had in his possession a knife and a revolver at that time and two rings later identified as belonging to Paul Conard. (N.T., Pre-Trial Hearing, pp. 177-205).

After Appellant was arrested, he was brought to police headquarters, and was later arraigned. Shortly

after Appellant's arrival at headquarters, he was questioned on the murders and on the weapons in his possession.

At trial, Lancaster Police Lieutenant Michael Landis testified with respect to his interrogation of Appellant on the morning of July 26, 1985, shortly after Appellant had been taken into custody and read his *Miranda* rights.[3] Appellant was questioned about the incriminating rings and the gun found in his possession. He offered an explanation of his whereabouts on the crucial dates in question, but could not provide the names of witnesses to corroborate his story. He could offer no cogent explanation as to why he checked into the motel under an alias. Appellant claimed that he got the gun and the rings in exchange for drugs (a quarter gram of crank – methamphetamine) but would not, or could not, name the other party to the transaction. When asked whether he knew Sandy Wiker (one of the victims in this case), Appellant denied knowing her. He was then confronted with the fact that her name was listed in an address book taken from him previously. Appellant could not explain the discrepancy, became angry, and asserted that all the police had him for was receiving stolen property. (N.T., pp. 1078-1087). Under the circumstances, and especially in light of the fact that no eyewitnesses to these crimes were called to testify by the Commonwealth, this testimony as to Appellant's answers during the interrogation

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[3] No tape recording of the interrogation was made. (N.T., Pre-Trial Hearing, p. 279.)

was highly damaging to Appellant's cause. If this testimony of Lieutenant Landis was improperly admitted at trial, in whole or in part, and we conclude that it was, Appellant is clearly entitled to a new trial.

At the pre-trial hearing held in this case to determine whether or not Appellant's statements should have been suppressed, the Assistant District Attorney elicited the following on direct examination of Lieutenant Landis:

> Q. During the interview, did Mr. Zook ever request an attorney?
>
> A. Approximately – I don't know, two-thirds of the way into the interview, something like that, right around the time we got through talking about whether he knew Conard or Wiker, he asked if he could use the phone to call his mother to see if she could get him an attorney. At that point, I said are you saying you want us to stop questioning you until you have an attorney present? And he said no, go ahead and finish with what you are doing. That was the only time that he came close to asking for an attorney, if that's what that was. (N.T., Pre-Trial Hearing, p. 269).

We think that the trial court was in error in failing to suppress all statements made by Appellant after he made the request to use the phone to have his mother get an attorney.[4] In *Edwards v. Arizona, supra,* the United States Supreme Court held that:

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[4] It is impossible to determine from this record at precisely what point in the interrogation the request for an attorney occurred. It is impossible, therefore, to ascertain which damaging statements were made before the request for an attorney as

(Continued on following page)

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
>
> . . . . We . . . emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

451 U.S. at 484-85, 101 S.Ct. at 1884-85 (footnote omitted).

In *Commonwealth v. Hubble*, 509 Pa. 497, 504 A.2d 168 (1968), (per Larsen, J., with two Justices concurring, one Justice concurring specially, and one Justice concurring in part), we determined that the accused's utterances regarding an attorney were too imprecise to trigger the prophylactic rule barring further police-initiated interrogation as required by *Edwards v. Arizona, supra*. "To hold that every utterance of the word 'lawyer' automatically" invokes *Edwards* "would be far too rigid and would not serve the interests of justice." 504 A.2d at 175.

(Continued from previous page)

opposed to after. If and when the Commonwealth decides to re-try Appellant and seeks to use the results of this interrogation as evidence, the trial court will be obligated to make certain that any damaging statements given by Appellant were given *before* his request for an attorney, if they are to be used against him at trial.

We also concluded that the accused was not misled by an erroneous police statement regarding the public defender. We then included the contested utterances within the totality of circumstances test of *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), which holds that where a suspect rather than the police initiates further conversation, the evidence is not suppressed automatically under *Edwards*. We buttressed this last conclusion by noting as well that even if the initial admission had been infirm, Hubble voluntarily gave statements later (the next day) which in any case cured any original defect.

In contrast with *Hubble, supra,* Appellant clearly invoked his rights under *Miranda* to secure counsel. Appellant's request here to use the phone to call his mother to see if she could get him an attorney is a clear exercise of that right. Further interrogation at that point was not instigated by Appellant but by Lieutenant Landis. We do not view Lt. Landis' *continued* questioning as intended to clarify Appellant's desires respecting counsel. What, in Appellant's request, needs clarification? What was equivocal or ambiguous? Appellant reportedly said, "Can I use the phone to call my mother to see if she can get me an attorney?" to paraphrase Lt. Landis' testimony. The only acceptable response from the police should have been "YES"! Not, "are you saying you want us to stop questioning you until you have an attorney present?" He did not unilaterally initiate continued interrogation as the suspect did in *Hubble*. He was led into continued questioning by Lt. Landis. That is the distinguishing factor between this case and *Hubble*.

Moreover, Appellant's subsequent cooperation cannot be used to cast doubt on the validity of his initial assertion of the right to counsel. See, *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984).

Appellant's request for a new trial is granted.

MR. JUSTICE LARSEN files a Dissenting Opinion in which MR. JUSTICE FLAHERTY AND MR. JUSTICE McDERMOTT join.

[J-141-1988]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 37 E.D. Appeal Docket 1987
Appellee	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Lancaster County, Criminal Division, No. 1700 of 1985, Entered on February 19, 1987.
v.	:	
ROBERT PETER ZOOK, JR.,	:	
Appellant	:	
	:	RE-ARGUED: SEPTEMBER 26, 1988

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: February 2, 1989

I dissent. Contrary to the majority's conclusion, appellant's statements were not inadmissible under *Commonwealth v. Hubble*, 509 Pa. 497, 504 A.2d 168 (1986) because, again contrary to the majority's assertion, appellant did not "clearly invoke his rights under *Miranda* to secure counsel."

As the record demonstrates, appellant merely "asked if he could use the phone to call his mother to see if she could get him an attorney." Quite legitimately, the police officer queried "are you saying you want us to stop questioning you until you have an attorney present?" Appellant responded "no, go ahead and finish with what you are doing."

There is nothing in this exchange (which was "the only time he came close to asking for an attorney") that would trigger the prophylactic rule of exclusion of *Edwards v. Arizona*, 451 U.S. 477 (1981), *reh'g denied*, 452 U.S. 973 (1981). Appellant's "request for any attorney" was equivocal and was properly clarified by the police officer's response. Accordingly, appellant's statements were properly admitted by the trial court.

Mr. Justice Flaherty and Mr. Justice McDermott join in this dissenting opinion.

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
V.	:	No. 1700-1985
ROBERT PETER ZOOK, JR.	:	

OPINION

BY BUCKWALTER, J.

On July 26, 1985, the bodies of Paul Conard and Sandra Wiker were discovered at 868 North Queen Street, Lancaster, Pennsylvania. The murders were very brutal, with both bodies having been stabbed, strangled, bound and gagged. The lengthy and intense investigation which followed produced the arrest of the defendant and two others. The defendant was subsequently charged with two counts of criminal homicide.

On March 19, 1986, after a trial by jury, the defendant was found guilty of two counts of first degree murder, and was sentenced to death. The defendant has filed timely motions in arrest of judgment and for a new trial which we now consider.

I. *SUFFICIENCY OF EVIDENCE*

The defendant first argues that the evidence was insufficient to prove beyond a reasonable doubt that the defendant committed the crime of first degree murder. The test in determining if the evidence is sufficient to sustain a criminal conviction is, whether accepting as true

all of the evidence of the Commonwealth, and all reasonable inferences arising therefrom, upon which the jury could properly have reached its verdict, was it sufficient in law to prove beyond a reasonable doubt that the defendant was guilty of the crime for which he was convicted. *Commonwealth v. Burton*, 450 Pa. 532, 301 A.2d 599 (1973); *Commonwealth v. Anderson*, 345 Pa. Super. 407, 498 A.2d 887 (1985).

In viewing the evidence in the light most favorable to the Commonwealth as verdict-winner, the trial testimony established the following facts:

On the evening of July 23, 1985, the defendant and two others implicated in the murders, Allen Ault and Sandy Nace, were seen together at the Little Dutch Bar in Lancaster. Several of the prosecution witnesses' testimony pieced together that Zook and Ault were there at 7:00 p.m. At 9:00 p.m. the defendant asked Karen Hanna to drive him to Sandy Nace's house. She obliged and the defendant spoke with Nace for about fifteen minutes, after which Hanna drove the defendant and Nace back to the Little Dutch Bar where they met with Ault. At approximately 11:00 p.m., the defendant and Nace left the bar, and Ault left about an hour later. (Notes, Trial, pp. 891, 938-946, 953-956)

Marcellus Barnett testified that late that night the defendant visited him and asked him questions about Paul Conard's house. The defendant asked him about any money or guns that Conard might have in his apartment. He asked Barnett if he could find out how much money Conard had at the house. Barnett then drew a diagram of Conard's apartment so that the defendant would know

his way around when they went to rob him. Zook, Nace and Barnett then walked downtown, at which time Zook and Nace parted company with Barnett. (Notes, pp. 883-888)

Barnett further testified that he later found out that Conard did not have much money in his house and he tried to inform the defendant that this "job wasn't worth it". Unfortunately, Barnett could not find the defendant and rode by Conard's house to see if anything was happening. Barnett stated that he did notice the back door of the house was open. (Notes, pp. 890-894)

Barnett did not see the defendant again until the next night when Zook came to see him at 2:00 a.m. The defendant told Barnett that they had forced their way into Conard's house by gunpoint, had tied up both Conard and his girlfriend, stabbed them, took guns and money and left. The defendant also told Barnett that he and Nace had left behind some guns and appliances because they might lead to them. (Notes, pp. 896-7)

When the bodies of Conard and Wiker were found the next day, they were bound, gagged and stabbed. Several guns were wrapped in wall hangings and were lying on the floor. The VCR was unplugged and the cord was wrapped up and lying on top of it. The T.V. was also unplugged. (Notes, pp. 811-12, 813-14, 820-1)

Joann Hill, an employee of the Parkside Motel, testified that the defendant registered at the motel on July 25, 1985 under the name of James Long. (Notes, pp. 993-4) He was arrested there two days later by the Lancaster City Police. He had in his possession at that time a gun, a knife, and two rings. (Notes, pp. 916, 923) Two friends of

Mr. Conard, Kenneth Nestle and Walter Newton, testified that the two rings found on the defendant belonged to Paul Conard. (Notes, pp. 926, 930-933) Karen Hanna testified that she saw the defendant on July 24th at the hotel and that he had two rings on a chain in his possession. (Notes, p. 951)

Debra Foote, a friend of the defendant, testified that she was with the defendant, Nace and Ault at the home of Ben Ressler one or two nights after the murder. She stated that while she was in the basement with Zook and Ault that Zook handed Ault a knife and Ault replied, "Did you wipe the blood off of it?" (Notes, p. 1005)

James Walck, who was incarcerated with the defendant after his arrest at the Lancaster County Prison, testified that Zook told him about the murders and the robbery. He told Walck how they had bound, gagged and stabbed the two victims, and also confessed that he had sodomized Sandra Wiker. After Zook told Walck about the crimes, Walck contacted the police. (Notes, pp. 1031-1036)

Agent Richard Reem, a special agent with the F.B.I., testified that human blood taken from the boot of Bob Zook matched the blood type of Paul Conard. The defendant did not have the same blood type. Agent Reem further testified that Paul Conard's blood type is only found in 1.9% of the white population. (Notes, pp. 1175, 1180)

In light of the above testimony, we find that the evidence was sufficient to support the jury's verdict.

II. *WEIGHT OF THE EVIDENCE*

Defendant's motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence contends that although there may be sufficient evidence to sustain the verdict, the verdict is against the evidence. Whether a new trial should be granted on these grounds is left to the sound discretion of the trial judge, and the decision will not be reversed on the appeal unless there has been an abuse of discretion. *Commonwealth v. Taylor*, 324 Pa. Super. 420, 471 A.2d 1228 (1984); *Commonwealth v. Zapata*, 447 Pa. 322, 290 A.2d 114 (1972). The test is not whether the court would have decided the case in the same way, but whether the verdict is so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative. *Taylor, supra; Commonwealth v. Sample*, 321 Pa. Super. 457, 468 A.2d 799 (1983); *Commonwealth v. Ruffin*, 317 Pa. Super. 126, 463 A.2d 1117 (1983).

In light of the evidence produced at trial and set forth above, we cannot find that the verdict was contrary to the weight of the evidence.

III. *THE LEGALITY OF THE ARREST AND THE SUBSEQUENT EVIDENCE SEIZED*

The defendant raises several issues concerning his arrest and the evidence that was obtained pursuant to that arrest. Initially the defendant argues that his warrantless arrest was not supported by probable cause and was therefore illegal.

It is well settled law in Pennsylvania that a warrantless arrest is permissible given probable cause. *Commonwealth v. Hunter*, 240 Pa. Super. 23, 360 A.2d 702 (1975); *Commonwealth v. Rutligliano*, 310 Pa. Super. 364, 456 A.2d 654 (1983). The existence of probable cause for arrest can be determined only upon examination of the facts of each individual case. *Commonwealth v. Perry*, 334 Pa. Super. 445, 483 A.2d 561 (1984). The burden is on the Commonwealth "to show with reasonable specificity facts sufficient to establish that probable cause existed". *Commonwealth v. Holton*, 432 Pa. 11, 247 A.2d 228 (1968). The test is whether "the facts and circumstances known to the police or about which they have reasonably trustworthy information at the time of the arrest would warrant a person of reasonable caution in believing that the person has committed or is committing a crime". *Commonwealth v. Rutigliano, supra; Commonwealth v. Bartlett*, 486 Pa. 396, 406 A.2d 340 (1979).

The facts as to the defendant's arrest were as follows:

On the morning of July 26, 1985, several detectives of the Lancaster Police Department along with the district attorney interviewed Marcellus Barnett and Timi Buterbaugh concerning information they possessed about the Conard-Wiker murder. The two individuals arrived at the police station earlier that evening and were questioned until about 1:00 or 1:30 a.m. Mr. Barnett told the police about his involvement in giving the defendant the layout of Conard's apartment and other information possibly linking the defendant to the murders. Barnett further stated that he believed that the defendant was staying at the Parkside Motel under an assumed name and that he was probably armed. After the interview with Mr. Barnett

was completed, the police began to type his statement and attempt to corroborate as much of the information he had given them as possible. (Notes, Pretrial Hearing, pp. 199-200, 219-224)

In the meantime, the police decided to place a stake-out at the motel in the event the defendant attempted to leave. Two police officers were sent to the motel at 3:00 a.m., were advised of the situation and were instructed not to do anything unless it appeared that the defendant was attempting to leave. The officers were informed that the defendant may be armed and dangerous. (Notes, Pretrial Hearing, pp. 177, 190, 199-205)

At 6:00 a.m., the decision was made to begin to type the warrant for defendant's arrest and the warrant was started. However, at 6:26 a.m. the defendant left his hotel room, and pursuant to their instructions, the police officers placed the defendant under arrest. The defendant had in his possession a knife and a revolver at that time. (Notes, Pretrial Hearing, pp. 178-180; 190-191)

The defendant argues that the arrest was illegal and unconstitutional; first, because the officers lacked probable cause, and secondly, that there was no legal justification for the officers failing to obtain an arrest warrant.

Initially, we find that the police had probable cause to arrest the defendant. Mr. Barnett had told the police that he had given the defendant information and drawings concerning the victim's home on the night of the murder in order for the defendant to burglarize it. There was ample reason for the police to believe Barnett since it appeared that the house had been ransacked as in a burglary. Barnett's statement was made against his own

penal interest since it admitted that he was involved in at least planning this burglary. This makes his statement more reliable. *Commonwealth v. Miller*, 497 Pa. 257, 439 A.2d 1167 (1982). And finally, the information concerning the defendant's presence at the motel was corroborated by the motel manager.

Defendant bases his second argument on the reasoning that there was no legal justification for his arrest. In essence, the defendant argues that the police should have waited until the arrest warrant was procured before they apprehended him. This argument must also fail, not only because there was probable cause for defendant's arrest but also because of the exigent circumstances that existed at the time the police officers took the defendant into custody.

Here, the police were investigating a double homicide and had obtained reliable information concerning the defendant's involvement. In a short period of time, the police learned of defendant's whereabouts and were able to confirm Barnett's statement that the defendant was staying at the Parkside Motel under an alias. The defendant was believed to be armed and was obviously hiding. When the defendant left his room and appeared to be leaving, the officers had ample reason to apprehend him before he fled.

A similar situation was found in *United States v. Huslage*, 480 F. Supp. 870 (W.D. Pa. 1979) where the police made a warrantless arrest of the defendant outside his motel after receiving word of his presence there. The Court stated that where probable cause exists, the police do not need a warrant to arrest a suspected felon in a

public place. The circumstances were such that immediate action was necessary.

We believe that the circumstances here required immediate action by the officers and that his arrest was justified. As the Court stated in *Commonwealth v. Fiore*, 281 Pa. Super. 1, 5, 421 A.2d 1116, 1118 (1980), "the standard of probable cause however, must be applied to the totality of the circumstances facing the police. Facts insufficient to justify an arrest if considered separately may, in combination, supply probable cause."

IV.

Since we have determined that the arrest of defendant was legal, the knife and gun confiscated from him at the time of his arrest were properly admitted at trial. *Commonwealth v. Magwood*, 503 Pa. 169, 469 A.2d 115 (1983); *Chimel v. California*, 395 U.S. 752 (1969).

After the defendant was arrested, he was brought to police headquarters, and was arraigned at 12:17 p.m. on a firearms violation charge. He was not arraigned on the murder charge until 4:50 p.m. After the time of defendant's arrest he was questioned on the murders and on the guns in his possession. Defendant claims that because his arraignment for the criminal homicide charges did not occur within six hours of his arrest any statements that he made after his arrest but before his arraignment should have been suppressed.

Pennsylvania had adopted the "six-hour rule" set out in *Commonwealth v. Davenport*, 471 Pa. 278, 370 A.2d 301 (1977). There, the Court held that if the accused is not

arraigned within six hours of his arrest, any statement obtained after arrest but before the arraignment shall not be admissible at trial.

We find defendant's argument concerning the time of arraignment on the homicide charges to be without substance. The purpose of the six-hour requirement set out in *Davenport* is to "insure that the accused is promptly afforded the protections embodied in Pa. R. Crim. P. 140." *Id.* at 283, 370 A.2d at 304. These protections, such as receiving a copy of the complaint against him, having the right to secure counsel and have bail set are afforded in any arraignment. A similar situation existed in *Commonwealth v. Robertson*, 317 Pa. Super. 158, 463 A.2d 1133 (1983) where the defendant was arrested for murder and robbery, was arraigned on the murder charge within six hours, but was not arraigned on the robbery charge until six hours and ten minutes after his arrest. The defendant contended that since his arraignment on the robbery charge was outside the six-hour limit of *Davenport*, a confession taken during that time which was used against him at trial should have been suppressed. Although the court noted a preference for arraignment of *all* charges within the six-hour limit, Judge Brosky noted in his opinion that "the rule reflects the importance of having the accused informed of his rights by a neutral judicial authority." *Robertson* at 161-2, 463 A.2d at 1135. The Court then found that this purpose was fully served by the defendant's arraignment on the murder charge.

In this case the defendant was afforded all the protections of Pa. R. Crim. P. 140 by his arraignment on the firearms charge within six hours of his arrest. Although it would have been preferable to arraign the defendant on

all charges at that time, the fact that he was not arraigned on the homicide charges until four and one-half hours later did not violate the spirit of the rule set out in *Davenport*.

The defendant also claims that his statements made during questioning should have been suppressed because he was not afforded legal counsel when he requested it. Detective Landis, one of the interrogation officers, testified at the Suppression Hearing that there was only one time when the defendant mentioned obtaining counsel:

> Q. During the interview, did Mr. Zook ever request an attorney?
>
> A. Approximately – I don't know, two-thirds of the way into the interview, something like that, right around the time we got through talking about whether he knew Conard or Wiker, he asked if he could use the phone to call his mother to see if she could get him an attorney. And at that point, I said are you saying you want us to stop questioning you until you have an attorney present? And he said no, go ahead and finish with what you are doing. That was the only time that he came close to asking for an attorney, if that's what it was.

Notes, Pretrial Hearing, p. 269.

The officers were clear in stating that they would end the questioning if the defendant desired to obtain counsel at that time. The defendant knowingly responded that he was willing to finish answering their questions without calling his mother. Therefore, we find that the defendant did not invoke his right to have an attorney present during questioning.

Finally defendant claims that the statements should be suppressed because he had obtained legal counsel, the

police were advised of this fact and the defendant wished to invoke his rights under the Fifth Amendment. There is no evidence in the record to support this contention. In fact, defendant's statement about calling his mother completely contradicts this argument.

V.

Next, defendant challenges the search of his person conducted on July 26, 1985 pursuant to a warrant. For a search warrant to be constitutionally valid, the issuing authority must decide that probable cause exists at the time of its issuance and this determination must be based on facts described within the four corners of the supporting affidavit. *Commonwealth v. Stamps*, 493 Pa. 530, 427 A.2d 141 (1981). In examining the affidavit we find that sufficient probable cause existed in order for a warrant to be issued. The police had the statement of Marcellus Barnett concerning the planned burglary of the Conard residence and the defendant had admitted his participation in the crimes to Barnett after that night. Also at the time of his arrest the defendant had in his possession two rings which were identified as belonging to Paul Conard. Finally the defendant had a history of criminal activity including burglary and theft. These facts taken together are sufficient to establish the necessary probable cause.

VI.

The last issue that defendant raises concerning his arrest and the subsequent police searches concerns the search of the motel room where he was staying. Various articles of clothing, sheets and cigarette butts were taken

from the room. However, since none of the items seized were admitted at trial, this issue is moot.

VII. *VIOLATIONS OF PA. R. CRIM. PROCEDURE 140 AND 1100*

Next, defendant claims that since his preliminary hearing was not held until 27 days after his arrest, the charges against him should have been dismissed. The timing for Preliminary Hearings is governed by Pa. R. Crim. P. 140, which states in part,

> . . . (d) Unless the preliminary hearing is waived by a defendant who is represented by counsel, the issuing authority shall:
>
> > (1) fix a day and hour for preliminary hearing which shall not be less than three nor more than ten days after preliminary arraignment unless extended for cause shown . . .

As the Rule states, the preliminary hearing can be held outside the ten day period if sufficient cause is shown. *See Commonwealth v. Maute*, 336 Pa. Super. 394, 485 A.2d 1138 (1984); *Commonwealth v. Suggs*, 289 Pa. Super. 44, 432 A.2d 1042 (1981). Patricia Urey, a scheduling clerk for Consolidated Court, testified at the Pretrial Hearing that the defendant's preliminary hearing was originally scheduled for August 2, 1985, within the ten-day period. However, the case had to later be rescheduled for August 22, 1985 due to a full schedule at the District Justice Office. (Notes, pp. 253-4) The full schedule was good cause for the hearing to be rescheduled for August 22nd, and therefore defendant's request for dismissal on this ground must fail.

VIII

Defendant also claims a violation of Pa. R. Crim. P. 1100, which requires that defendant's trial commence no later than one hundred and eighty days after the Complaint is filed. The Rule requires that the prosecutor must show due diligence in bringing the case to trial and must explain to the Court the reasons for the delay. Pa. R. Crim. P. 1100(c)(3). The Courts of Pennsylvania have not yet defined "due diligence" but they have concluded that such a showing depends on the circumstances of each case. *Commonwealth v. Maxwell*, 505 Pa. 152, 477 A.2d 1309 (1984) reh'g. denied, ___U.S.___, 105 S.Ct. 3516, 87 L.Ed.2d 644 (1985); *Commonwealth v. Roman*, 494 Pa. 440, 431 A.2d 936 (1981). Our Supreme Court has recognized, however, that despite diligent efforts by the Courts, some cases arise when the trial cannot be held within the prescribed period. *Commonwealth v. Mayfield*, 469 Pa. 214, 364 A.2d 1345 (1976).

In this case, the criminal complaint was filed on July 26, 1985. On January 15, 1986, the defense stated they were not prepared to go forward due to the fact that they had only recently received a copy of an F.B.I. report involving elements of physical evidence although they had been told the substance of the report several weeks before. The prosecution stated they were prepared to go forward to trial at that time. (Notes, Pre-trial Hearing, pp. 302-3) At the Rule 1100 hearing, the defense tried to show that the prosecution did not proceed with the case with due diligence. We can find no evidence whatsoever in the record to support the contention that the prosecution did not proceed with the case expeditiously. On the contrary, the record shows that the prosecution was extremely

diligent in gathering the evidence and information. The Commonwealth did have some problems in obtaining analyses of physical evidence by the F.B.I. Crime Laboratory but these delays did not occur through any fault of the prosecution. This, coupled with the fact that it was the defense who requested the continuance until the March term of Criminal Court, supports the Court's granting of the Commonwealth's petition for an extension of time.

IX. *VENUE*

Defendant argues that the Court erred in denying his pretrial motion for a change of venue. Defendant claims extensive pretrial publicity made it impossible for him to receive a fair trial in Lancaster County.

Pennsylvania law is clear that an application for a change of venue is within the sound discretion of the trial court. *Commonwealth v. Scott,* 469 Pa. 258, 365 A.2d 140 (1976). A defendant who claims he has been denied a fair trial because of extensive prejudicial publicity must show actual prejudice in the empaneling of the jury. *Commonwealth v. Casper,* 481 Pa. 143, 392 A.2d 287 (1977). The only exception to the guideline is when the publicity is so inflammatory and pervasive that the defendant need not show a nexus between the publicity and the jury prejudice. *Commonwealth v. Frazier,* 471 Pa. 121, 369 A.2d 1224 (1977). We find no evidence here to warrant that exception.

There is no question that there was publicity of defendant's arrest and the crimes for which he was accused immediately following his incarceration. Articles

appeared in the local paper and reports were heard on the radio and television. Ten of the twelve jurors selected admitted they had read or heard something about the case at one time. However, as the Court stated in *Commonwealth v. Casper, supra,* "It is not required that the jurors be totally ignorant of the facts and the issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Id.* at 152, 392 A.2d at 292 quoting *Irvin v. Dowd,* 366 U.S. 717, 722-23 (1961). Our inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the publicity, and if so, whether the juror could lay aside his opinion and render a verdict based on the evidence presented in court. *Commonwealth v. Kichline,* 468 Pa. 265, 361 A.2d 282 (1976); *Commonwealth v. Casper, supra.* If the jury can be empaneled without difficulty and the judge is satisfied that the publicity has not adversely affected the panel, a denial of change of venue is proper.

In this case, the Court properly delayed ruling on this change of venue motion until after the voir dire had been completed. *See Commonwealth v. Romeri,* 504 Pa. 124, 470 A.2d 498 (1983) *cert. denied,* 466 U.S. 942, 104 S.Ct. 1922, 80 L.Ed.2d 469 (1984). A review of the voir dire record indicates that none of the jurors who had read or heard something about the murders could remember any details. All twelve answered, "No," when asked whether they had formed any fixed opinions about the case. Both the prosecution and defense were able to question the

jurors about any possible prejudices or conclusions of guilt. Most of the publicity of the murders had occurred in late July and August of 1985. The trial was held in March, 1986, which allowed a considerable amount of time to pass from the publicity of the trial. Therefore, the Court did not abuse its discretion in refusing a change of venue.

X. *THE SELECTION OF THE JURY*

Next, the defendant challenges the selection of the jury array claiming that the jury commissioners deviated from the statutory requirements of jury selection. The rules governing the qualifications and selection of jurors are found in 42 Pa. C.S.A. § 4501 et seq. The rules specifically state that a person who has the right to a jury trial is entitled to jurors selected at random from a representative cross-section of the county. § 4501(1). A citizen cannot be excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status. § 4501(3). No one can serve as a juror if he or she cannot read, write, speak and understand English, has a mental or physical infirmity rendering him incapable of service or has been convicted to a crime punishable by imprisonment for more than one year. § 4502. Also, a person can be excused from jury duty if he or she can demonstrate to the court undue hardship or extreme inconvenience. § 4503(a)(3).

The defendant claims that the commissioners stepped beyond the bounds of the exclusions and exceptions set out above by excluding certain individuals from service. There is no objection to the preliminary selection of the

jury pool. The defendant only challenges the method by which the commissioners narrowed the pool to obtain the specific number of jurors necessary to conduct court during each quarter of the year.

A pretrial hearing was held on January 13, 1986 at which time the defense questioned the commissioners as to their selection procedures. Both Everett Rapp and Barbara Minney testified that they do not automatically exclude anyone who is not within one of the statutorily mandated groups. They did state, however, that they use their discretion by leaving certain persons for final selection. For example, Mr. Rapp testified that although he would not automatically disqualify a cancer patient or an elderly person who does not drive, he may leave them for final selection. Barbara Minney stated that she used a similar method. This seems to be a reasonable means of obtaining a group of jurors who are willing and able to serve.

Defendant claims this method usurps the court's power. However, both commissioners testified that their duties entailed narrowing the list of potential jurors to a workable list for each trial quarter. It is logical that they would attempt to first fill the positions with those individuals who did not object to jury service or did not cite a severe hardship on their questionnaire.

Although there is little case law on this issue, *Commonwealth v. Kloch*, 230 Pa. Super. 563, 327 A.2d 375 (1974) does give some guidance. There, the defendant challenged the exclusion of doctors and lawyers from the jury array. The Court reasoned that in order to attack the jury array, the appellant must show (1) the exclusion caused a

substantial or identifiable social or economic class to be unrepresented, (2) as a result of the exclusion those who were included in the array were unqualified to serve, or (3) the commissioners had improper motives or a discriminatory intent. *Id.* at 587, 327 A.2d at 388. We can find no evidence that the selection of the array fell into any one of these categories. More importantly, there is no evidence to suggest the defendant was prejudiced in any way as the result of the selection process. Therefore, the defendant's motion on this ground must be denied.

XI., XII

The defendant argues that the Commonwealth impermissibly used peremptory challenges and that it was error to allow the Commonwealth to death qualify the jury. Concerning the death qualification of the jury, the defendant contends that because the prosecution was permitted to eliminate jurors who stated that they would be unable to impose a sentence of death under any circumstances, the defendant was denied a trial by a representative cross-section of the community and an impartial jury. Our Courts have repeatedly held that the "death qualification" process is consistent with constitutional trial guarantees. *Commonwealth v. Smith,* ___ Pa. ___, 513 A.2d 1371 (1986), *Commonwealth v. Colson,* 507 Pa. 440, 490 A.2d 811 (1985) *cert. denied,* ___ U.S. ___, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986). See also, *Lockhart v. McGee,* ___ U.S. ___, 106 S. Ct. 1758, 90 L.Ed. 2d 137 (1986).

As the Court stated in *Commonwealth v. Maxwell,* ___ Pa. Super. ___, 513 A.2d 1382, 1388 (1986), "Such questioning [on general beliefs in the death penalty] is clearly

permissible since knowledge of a prospective juror's views on the death penalty is absolutely vital to both counsel in determining whether first, to challenge for cause, or second, to challenge peremptorily."

As to the argument that the Commonwealth improperly used preemptory challenges (specifically see Trial Notes, pp. 132-5, 587-591, and 663-664), we can find no merit in it. The defendant states that the issue here is the impermissible broadening of the scope of exclusion so as to eliminate jurors because of their views on the death penalty. There is no evidence in the record to indicate that the prosecutor used a recognized impermissible basis for challenging a juror.

XIII. *TESTIMONY OF WITNESSES*

The defendant next argues that the Court erred in allowing James Ray Walck to testify as to statements that the defendant made in his presence. The defendant contends that Mr. Walck was acting as a confidential informant for the Commonwealth and his testimony is therefore inadmissible pursuant to *United States v. Henry*, 447 U.S. 264 (1980).

A close examination of the record indicates there is no evidence whatsoever to support the contention that Mr. Walck was an informant for the state at the time the defendant made the statements to him. Mr. Walck said the defendant had initiated the conversation and after the statements had been made, Mr. Walck decided to contact the police. Furthermore, Walck said that after he spoke with the police, they explained to him that he was not permitted to question the defendant anymore without

giving him his Miranda rights because he was now considered an "agent for the state". (See Trial Notes, pp. 1036-7).

XIV.

Next defendant asserts that he should be granted a new trial because of a statement made by Karen Hanna in court. Ms. Hanna, a prosecution witness, was a close friend of the defendant who had substantial contact with him after the murders but before his arrest. At trial, the following questioning occurred:

> [District Attorney]
> Q. What happened next, then Karen?
>
> [Karen Hanna]
> A. We [she and defendant] sat down and talked. He told me about this girl Wednesday night had come into the Little Dutch and told him that the cops were looking for him to question him about the murders.
>
> Q. Did you know about the murders?
>
> A. No. The way I found out was on the way out to the motel. The taxicab driver told me.
>
> Q. He said the cops were looking for him to talk to him about the murder?
>
> A. (indicates yes)
>
> Q. What did you say?
>
> A. I told him that they are probably going down through the list of people who got out recently and, you know, robbery was supposed to be the motive and there are probably just questioning everybody, and if he didn't do nothing, to go down and say here I am.

Q. That is when you told him to go down and say here I am?

A. Yes.

Notes, Trial, pp. 947-8.

The defendant argues that Ms. Hanna's reference to "people who got out recently" is a direct reference to prior activity and is therefore error. It is true that a mistrial should be granted when the jury may reasonably infer from the testimony that the accused had engaged in prior criminal activity. *Commonwealth v. Shephard*, 269 Pa. Super. 291, 409 A.2d 894 (1979). However, there is "no per se rule requiring a new trial for every reference [to prior criminal conduct]." *Commonwealth v. Colon*, 264 Pa. Super. 314, 399 A.2d 1068 (1979). Mere "passing references" to prior criminal activity do not warrant reversal unless the record illustrates that prejudice resulted. *Commonwealth v. Nichols*, 485 Pa. 1, 400 A.2d 1281 (1979). Prejudice results where the testimony affects the case to the extent that it denies the defendant a fair trial. *Commonwealth v. Gaerttner*, 335 Pa. Super. 203, 484 A.2d 92 (1984).

In order to determine whether or not a remark was prejudicial to the defendant, Pennsylvania courts have developed several guidelines for the trial court to consider when a motion for a mistrial arises. These criteria were set out in *Commonwealth v. Gaerttner, supra*, and are as follows:

1. First and foremost, did a witness make a remark which refers to the defendant having a criminal conviction or participating in prior criminal activity?

2. Was the remark intentionally elicited by the Commonwealth?

3. Was the answer responsive to the question? And,

4. Were curative instructions given? In light of these criteria we find that the comment did not warrant a mistrial. First, Ms. Hanna's remark was not a direct reference to the defendant serving time in jail. The words "jail", "prison", or "time served" were not used nor was the name of a particular prison mentioned. The reference was so innocuous that the trial judge did not hear it and the defense counsel did not make a motion for a mistrial until after six more questions had been asked.

Secondly, there is no indication that the remark was intentionally elicited by the prosecutor. The prosecutor was questioning Ms. Hanna about her conversation with the defendant in the motel room when she spontaneously made the remark. It appears that the prosecution wished the witness to comment about her telling the defendant to go down to the police station and see why they were looking for him, since the next two questions pertained to that part of her answer.

Thirdly, the answer was responsive to the question only to the extent that the question was open-ended. The question was "What did you say?" and the witness answered accordingly. It was not a specific answer to a specific question.

Fourth, no curative instructions were given for several reasons. At the trial, the witness was talking rapidly and in a low tone. The judge stated at side bar that he didn't even hear the comment and it took defense counsel six more questions and answers to make a motion for mistrial. The Court stated its reasons for not giving curative instructions as follows:

> THE COURT: It is my observation – it is twofold.
>
> Number one, I didn't hear what she said. I don't know if half the jurors did.
>
> Number two, if I bring it up now, it would do more harm by making a cautionary instruction than it would be just to leave it go by. And that's what I intend to do. I intend not to grant a motion for mistrial, not to instruct the jury to ignore it, for the reasons that it was hard to hear what she said. And calling at this time their attention would do more harm than good.

Notes, Trial, p. 950.

Finally, we note that the decision as to whether or not a mistrial should be declared is addressed to the sound discretion of the trial judge. *Commonwealth v. Colon, supra,* at 322, 399 A.2d at 1071. *Commonwealth v. Jose Figueroa,* Northampton Rprt., Vol. XLVII (Jan. 1, 1987).

For all of the reasons stated above, we deny the defendant's motions on this ground, and find that the Court did not err in failing to grant a mistrial.

XV.

The defendant argues that the Court erred in admitting statements from Commonwealth witness Deborah Foote which were made by co-conspirator Allen Ault to the defendant in her presence. Ms. Foote testified that on the night of July 24 through the morning of July 25, 1985, she was in the company of the defendant, Allen Ault, Sandy Nace, Ben Ressler and his wife and several others at Mr. Ressler's home. At one point during the evening, she was in the basement with the defendant and Ault.

Her testimony at the trial as to the events which then occurred was as follows:

> Q. Was anything going on, then, after that? Was Allen doing anything or showing anything or Bob doing anything or showing anything?
>
> A. Al was sitting at the desk and he was playing around with the desk top and Bob handed him a knife and Al was kind of laughing and he said that – to Bob if Bob wiped any blood – the blood off the knife. I didn't really take too much to it at the time because they had a strange sense of humor and I didn't really find it funny.

Notes, Trial, p. 1005.

It is well-settled that statements of a conspirator made during the course of a conspiracy are admissible against a co-conspirator if independent evidence establishes the existence of a conspiracy and the membership of the defendant and declarant therein. *Commonwealth v. Pinkins*, 343 Pa. Super. 44, 493 A.2d 1365 (1985). Furthermore, the Commonwealth must only show that a conspiracy existed by a fair preponderance of the evidence independent of the challenged testimony. *Id.* at 50, 493 A.2d at 1368. The act or statement of one of them must be done in the furtherance of and during the continuance of the common purpose. *Commonwealth v. Ransom*, 446 Pa. 457, 288 A.2d 762 (1974). Once the conspiracy ends, however, statements or acts of the co-conspirators are only admissible against those who made them. They are not admissible against the others.

The defendant asserts that because there was insufficient evidence of a conspiracy up to that point in the trial, that the statements do not fall under the co-conspirator

exception to the hearsay rule. In the alternative, the defense's position is that even if a conspiracy was shown to have existed between Zook and Ault, the conspiracy would have ended after the murder had been completed and the goods from the robbery divided, thereby making the statement inadmissible under the hearsay exception. The defense relies primarily on *Commonwealth v. Evans*, 489 Pa. 85, 413 A.2d 1025 (1980). In that case one of the co-conspirators, McBee, gave the murder weapon to a witness, Adams, and asked him to hold on to it. This occurred about a week after the murder and before any arrests occurred. The defendant was not present at that time. The Court reiterated the rule that,

> "The declarations or acts of one conspirator made to third parties in the absence of his co-conspirator are admissible in evidence against *both* provided that such declarations or acts were made during the conspiracy and in furtherance of the common design."

Id. at 92, 413 A.2d at 1028.

After a discussion of the law relating to whether attempts by a co-conspirator to conceal evidence after the commission of a crime come within the scope of the conspiracy, (see in particular, *Commonwealth v. Pass*, 468 Pa. 36, 360 A.2d 167 (1976)), the Court found that McBee's passing of the murder weapon to Adams did not fall within the scope of the conspiracy. Nonetheless, the Court found that the admittance of the evidence was harmless error and did not necessitate a new trial.

Although the facts of *Evans* seem strikingly similar to the case at bar, we find one distinguishable and important difference. In *Evans* the defendant was not present

when the statements were made whereas the statement in the present case was made directly to Mr. Zook. This factor is an important consideration which must be taken into account.

The co-conspirator declaration rule set out above specifically goes to statements made "*in the absence* of his coconspirator". There is no mention of statements made in the defendant's presence. In *Commonwealth v. Faraci*, 319 Pa. Super. 416, 466 A.2d 228 (1983), the Court addressed the situation where an incriminating statement was made in the defendant's presence. There, the appellant and two others met together three days after a robbery-murder occurred. A conversation about the incident occurred between the two men in front of appellant, and appellant said nothing. Although the Court found that the conspiracy had ended and the principal objective had been accomplished, the statements and appellant's silent approval thereof qualified as a tacit admission and were admissible.

The Court stated "where a person is implicated as a principal in the commission of a crime and is afforded an opportunity to comprehend and deny his involvement, under circumstances not consonant with an exercise of his right to silence under the 5th Amendment, and he fails to speak, the statement and his silence are admissible against him as a tacit admission of guilt." *Id.* at 424, 466 A.2d at 232. *See also, Commonwealth v. Scarborough*, 313 Pa. Super. 521, 460 A.2d 310 (1983); *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981).

Likewise in *Commonwealth v. Hubble*, 314 Pa. Super. 99, 460 A.2d 784 (1983), the Court found that statements

made in the appellant's presence were admissible against him, even though they were made after the crime had been committed. The Court found it unnecessary to determine whether the statements were made in furtherance of a conspiracy since the evidence was allowable as a tacit admission.

In this case, the statement was made by a co-defendant directly to the defendant the night after the double murders had occurred, in front of a third party who was not involved in the crimes. The statement was made in response to defendant's handing the knife to Ault. The defendant gave no answer to Ault's comment but apparently knew what he meant, since both men laughed. Neither attempted to explain to Ms. Foote what "blood" they meant. In light of these facts, we find the statement made by Ault in defendant's presence was admissible against the defendant.

XVI.

The defendant next argues that the Court erred in denying his motion to bar the introduction of evidence of blood stains and in permitting a witness to express an opinion about blood grouping.

Agent Richard Reem of the Federal Bureau of Investigation testified as to the blood typing of the victims and the suspects and as to any fluids found at the scene or on evidence. The Agent did find a small amount of blood on defendant's boot and analyzed it to determine its typing. However, in the process of analyzing the blood, all of the sample was consumed leaving none available for the

defendant's examination. The defendant claims that the unavailability of the blood sample denies him the right to examine possible exculpatory evidence.

In the recent case of *Commonwealth v. Tillia*, ___ Pa. Super. ___, 518 A.2d 1246 (1986), the defendant argued that the results of a blood alcohol test should have been suppressed because the Commonwealth failed to attempt to preserve the blood sample for independent analysis. The Court reiterated the standard whereby evidence is constitutionally required to be preserved by disclosure:

> Such evidence must (1) (possess) an exculpatory value that was apparent before the evidence was destroyed and (2) also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means . . . Further, there must be no indication that the authorities destroyed the evidence in order to circumvent the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963).

Tillia at ___, 518 A.2d at 1250, citing *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

We reject defendant's arguments for several reasons. First, although the blood was consumed in the testing, the FBI report was available for the defense's inspection. Secondly, Agent Reem testified as to the process and the results. The defendant was therefore able to cross-examine Agent Reem as to his qualifications, his methods of analyzing and the interpretations of the results. In *Commonwealth v. Mace*, 234 Pa. Super. 463, 341 A.2d 505 (1975) *cert. denied* 423 U.S. 996, 96 S.Ct. 423, 46 L.Ed.2d 370 (1975), autopsy specimens were destroyed after they were analyzed by the laboratory. However, the autopsy report was available for examination and the doctor who did the

autopsy was available to testify. The *Mace* Court reiterated the holding in *Commonwealth v. Cromartie*, 222 Pa. Super. 278, 294 A.2d 762 (1972) which found that there was no rule which would automatically necessitate a defendant's acquittal upon the Commonwealth's failure to produce physical evidence shown to be unavailable. *Mace* at 471, n. 8, 341 A.2d at 509. The Court held the evidence admissible.

Likewise, in *Commonwealth v. Chapman*, 255 Pa. Super. 265, 386 A.2d 994 (1978), several pieces of evidence were destroyed before defendant's trial and he complained that their destruction irreparable hindered his ability to use them to his advantage. However, the Court found the defendant's due process rights were not violated since the reports or recorded observations were made available.

Finally we note the evidence was not "lost" in the sense that it was carelessly thrown out or misplaced. Agent Reem testified that in order to properly test the blood stain, all of the blood had to be used. There was no method which could have preserved it for later examination. Therefore, the authorities did not "destroy" the evidence to prevent its disclosure.

As to defendant's objection to Agent Reem's opinion as to the presence of certain enzymes in the blood and the percentage of the white population that carries it, we must deny it also. Opinion evidence is admissible when the subject matter is distinctly related to a science, skill, or occupation beyond the knowledge or experience of the average layman. *Commonwealth v. Johnson*, ___ Pa. Super. ___, 517 A.2d 1311 (1986). Agent Reem's testimony was

based on his skill and knowledge of testing blood through his work in the FBI laboratory.

XVII. *PROSECUTORIAL MISCONDUCT*

The defendant next contends that the Court erred in denying his motion for mistrial during the prosecution's closing argument. During his closing, the prosecutor made a statement concerning the witnesses who were granted immunity. The prosecutor argued that the Commonwealth doesn't grant immunity "unless we can determine whether or not they are telling the truth." (Notes, Trial, p. 1266)

It is true that it is improper for a prosecutor to express a personal belief or opinion as to truth or falsity of evidence of guilt including the credibility of witnesses. *Commonwealth v. Anderson*, 501 Pa. 275, 461 A.2d 208 (1983). However, a mistrial is appropriate only if the remarks had the unavoidable effect of prejudicing the jury so as to render them incapable of objective judgment. *Commonwealth v. Yohn*, 271 Pa. Super. 537, 414 A.2d 383 (1979). As the Supreme Court stated in *Commonwealth v. Goins*, 508 Pa. 270, 276-7, 495 A.2d 527 530 (1985):

> [I]t is not every intemperate remark which will result in the grant of a new trial. Only those remarks whose unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict will necessitate the ordering of a new trial.
>
> *citing Commonwealth v. Simon*, 432 Pa. 386, 394, 248 A.2d 289, 292 (1968).

In this case, the remark of the prosecutor during his closing argument was as follows:

> Now, immunity for a possible conspiracy to commit murder sounds like something serious, and it is. I don't go around giving immunity to conspirators when somebody is ultimately killed lightly. I don't have a pocketfull of immunity slips, that when someone comes in, I can tell you all about this case, I write out immunity and give it to them. That is not the way it goes. They come in and they don't get immunity unless we can determine whether or not they are telling us the truth. Because the prosecution –

Notes, Trial, p. 1266.

It was at this point that the defense objected. The Court then gave an admonishment to the prosecution, and at the close of the argument, instructed the jury to disregard any personal beliefs or opinions presented by the Court or the attorneys. We believe that this was proper procedure to follow and that the remark was not prejudicial so as to render the jury incapable of objective judgment. Therefore, the defendant's request for a mistrial on this ground must be denied.

XVIII. *JURY INSTRUCTIONS*

The defendant alleges that the Court erred in refusing to read defendant's Points for Charge Numbers 9, 11, 12, 13 and 14. The defendant had timely submitted points for charge and excepted to the Court's refusal to read those set out above. (Notes, Trial, p. 1315).

In reviewing jury instructions to determine whether there was reversible error, the charge must be read as a whole; error cannot be predicated on isolated excerpts.

Commonwealth v. Woodward, 483 Pa. 1, 394 A.2d 508 (1978); *Commonwealth v. Alvin*, ___ Pa. Super. ___, 516 A.2d 376 (1986). There is no right to have any particular instruction or form of instruction given, *Alvin, supra*, and the Court is free to select its own form of expression. *Commonwealth v. Smith*, ___ Pa. ___, 513 A.2d 1371 (1986). All that is required is that the charge clearly and accurately explains the relevant law and clarifies the issues so the jury may comprehend the questions which they are to resolve. *Alvin*. Where the charge given by the Court properly covers the point which the defense requests, it is not error for the trial court to refuse to give additional instructions. *Commonwealth v. Hayes*, 314 Pa. Super. 112, 460 A.2d 791 (1983); *Alvin, supra*.

Point 9 submitted by defendant dealt with "expert witnesses". The Court covered the law relating to expert witnesses on page 1308-1309.

Point 11 submitted by defendant dealt with the fact that the blood found on Mr. Zook's boot was destroyed in the process of chemical analysis. The Court charged the jury on this factor on pages 1309-10 of the trial notes.

Points 12 and 13 pertained to the evaluation of the testimony of James Walck and Marcellus Barnett, both prosecution witnesses. Since both witnesses received special treatment by the prosecution, the defendant requested instructions pertaining to the reliability of their testimony. The Court accurately and thoroughly covered this point with regards to both Barnett and Walck on pages 1306-1308 of the trial notes.

Finally, Point 14 submitted by the defendant involved instructions as to the admission of a statement made by

the defendant. The Court charged the jury on this point on pages 1299-1303.

After reviewing the entire charge, we can find no inadequacies in the trial court's instructions.

XIX. *PHOTOGRAPHS OF VICTIMS AND EVIDENCE OF TORTURE*

The defendant next argues that the Court erred in permitting the district attorney to introduce and submit to the jury, two black and white photographs of the victims after their murder. These photos were admitted at the penalty phase of the trial and were not introduced during the guilt phase. The defendant maintains that these photos had no additional probative value and served only to incite and inflame the passions of the jurors.

The test to be applied in determining the admissibility of allegedly inflammatory evidence involves first, determining whether it is in fact inflammatory, and if so, then weighing it against its essential evidentiary value. *Commonwealth v. Buehl*, ___ Pa. ___, 508 A.2d 1167 (1986); *Commonwealth v. Pifer*, 284 Pa. Super. 170, 425 A.2d 757 (1981). The admission of the evidence is, of course, within the trial court's discretion, *Commonwealth v. Lightman*, 339 Pa. Super. 359, 489 A.2d 200, *cert. denied* ___ U.S. ___, 106 S.Ct. 1491, 89 L.Ed.2d 892 (1986) and will not be reversed absent a flagrant abuse of that discretion. *Commonwealth v. Millard*, 273 Pa. Super. 523, 417 A.2d 1171 (1979).

The pictures which the defendant wished to suppress were Commonwealth exhibits 59 and 60, one of the body

of Mr. Conard and one of the body of Miss Wiker. However, the fact that a photo depicts a corpse is not inflammatory per se. *Commonwealth v. Fred*, 327 Pa. Super. 199, 475 A.2d 754 (1984). In this case the trial judge carefully considered the possible inflammatory nature of the pictures and stated the pictures did have probative value in that they "helped to show exactly the method in which these victims were tied, where the tape was applied and how the cord was applied," and "they are of probative value in the District Attorney's burden to show the aggravating circumstances to the jury." (Notes, Penalty Hearing, p. 5). We find the facts here similar to those in *Commonwealth v. Buehl, supra*, where the pictures of the victims were admitted to show how the victims were found, the wounds inflicted, the premeditation and the torture. Both Mr. Conard and Miss Wiker were brutally tied, gagged and bound about the head with duct tape. We find as the Court did in *Buehl* that the probative value of the pictures clearly outweighed any prejudice.

XX.

This leads us to the question as to whether there was sufficient evidence for the jury to consider torture as an aggravating factor at the penalty phase. Under the Sentencing Code, evidence may be presented at the sentencing hearing which relates to any of the aggravating or mitigating circumstances specified. 42 Pa. C.S.A. 9711(a)(2). One of the specified aggravating circumstances is where "the offense was committed by means of torture". 42 Pa. C.S.A. 9711(d)(8). The defendant contends that it was error to deny his demurrer on this factor.

There is no set definition as to what constitutes torture under the law and therefore each case must be considered on the basis of its own facts and circumstances. The case of *Commonwealth v. Pursell*, 508 Pa. 212, 495 A.2d 183 (1985) does give some guidance, however, in determining what constitutes "torture". There, the Court found there was sufficient evidence to show an intent to subject the victim "to heinous, atrocious or cruel suffering". *Id.* at 240, 495 A.2d at 197. The Court stated, "it is our interpretation that torture is understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity." *Id.* at 239, 495 A.2d at 196. With this guideline in mind, we turn to the facts presented to the jury in the present case on the question of torture.

Dr. Enrique Penades, the pathologist who performed both autopsies, testified as to the condition of the bodies after the murders. Dr. Penades stated Mr. Conard had cellophane plastic tape wrapped tightly around his wrist, had telephone wire binding his arms and ankles and had two inch wide duct tape wrapped around his eyes and mouth. In his mouth, the doctor recovered a knotted cloth. He was stabbed five times in the back and five times in the head. The cause of death was determined to be strangulation. Miss Wiker was also bound and tied like Mr. Conard and had duct tape around her head and a nylon stocking stuffed in her mouth. She was stabbed once in the back and twice in the head and the cause of death was determined to be strangulation. (Notes, Trial, pp. 850-61, 865-71)

On review of these facts, we find there was sufficient evidence to support the finding of torture and therefore it was not error to deny defendant's motion for a demurrer on this factor.

XXI. *AGGRAVATING CIRCUMSTANCES*

The defendant next argues that it was error for the Court to deny a mistrial based on the prosecutor's argument during the penalty phase. The defendant contends that the prosecutor improperly characterized the evidence of involuntary deviate sexual intercourse as an aggravating circumstance which could be considered by the jury in their deliberations. There was evidence of the crime of involuntary deviate sexual intercourse introduced at the trial. James Walck testified that the defendant admitted having anal intercourse with Sandra Wiker. (Notes, Trial, p. 1032) Also, the underpants of Sandra Wiker were torn down the middle, which supports the finding of a sexual attack. (Notes, Trial, p. 867) In light of the fact that evidence of involuntary deviate sexual intercourse was presented at trial, it was a proper factor for the jury to consider in determining the aggravating circumstance of the commission of a felony during the murder.

XXII.

The next issue which we consider is whether the Court erred in its charge to the jury at the penalty phase with respect to mercy. The defendant does not question the Court's original charge to the jury but claims that

upon answering a question for the jury, the Court altered its charge relating to "feelings of mercy standing alone". In essence, the defendant claims the Court did not instruct the jury properly the second time.

The Pennsylvania Death Penalty Statute, 42 Pa. C.S.A. §9711 precludes an absolute mercy verdict. Our Supreme Court has held that this does not violate the Constitution. *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833 (1985). Although the death penalty statute does not allow a jury unbridled discretion to grant mercy, it does permit the defendant to introduce a broad range of mitigating evidence. *Commonwealth v. Peterkin*, ___ Pa. ___, 513 A.2d 373 (1986).

Here, the Court properly instructed the jury that they may consider mercy as a reason for granting life imprisonment but it must be made through the introduction of mitigating circumstances. There was no error by the Court in either the original charge or in the additional explanation in answering the jury's question.

XXIII.

Defendant argues that it was error to deny defendant's motion to poll the jury on their findings regarding aggravating circumstances. There was no error in this regard. The defendant does have a right to poll the jury after their verdict has been announced and it is reversible error to deny that right. *Commonwealth v. Parks*, 273 Pa. Super. 506, 417 A.2d 1163 (1979); *Reed v. Kinnik*, 389 Pa. 143, 132 A.2d 208 (1957). However, there is no absolute right to poll a jury on specific aggravating circumstances.

In *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *reh'g. denied*, 463 U.S. 1236 (1983), the defense counsel requested that the Court poll the jury as to which mitigating circumstances they found in reaching their final verdict. The trial court denied the motion and on appeal, the Supreme Court of Pennsylvania found that the trial court did not abuse its discretion in refusing to do so.

Likewise, it was not error for this Court to refuse to poll the jury on the accompanying circumstances. The Court properly individually polled the jury as to their sentence for the defendant upon defense counsel's request.

XXIV.

Finally the defendant challenges the constitutionality of the Pennsylvania Death Penalty Statute, 42 Pa. C.S. §9711(c)(l)(iv). The defendant argues that the statute is unconstitutional because (1) it denies due process in that it grants the jury a license to create its own standards in determining whether the aggravating circumstances outweigh the mitigating circumstances; (2) it fails to specify any burden of proof pertaining to the weighing process; (3) the requirement that aggravating circumstances must outweigh mitigating circumstances is vaguely phrased so that it allows unguided discretion to the jury; and (4) it denies equal protection under the law in that a defendant who demands a jury trial will have the same jury decide both guilt and the sentence imposed.

The Supreme Court of Pennsylvania has continuously upheld the constitutionality of the statute in every respect. *Commonwealth v. Peterkin*, ___ Pa. ___, 513 A.2d 373 (1986); *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833 (1985); *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984); *Commonwealth v. Zettlemoyer, supra*. Based on these holdings, we find the defendant's constitutional challenges without merit.

This Opinion is filed in support of this Court's Order of February 18, 1987, denying the post-trial motions of defendant.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER
JUDGE

Attest: Diana L. Thompson
Ch. Dep.

FILED

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an accused who is subjected to custodial interrogation is denied his rights under the Fifth and Fourteenth Amendments to the United States Constitution when the police fail to terminate the interrogation following his unambiguous assertion of his right to counsel?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA

Petitioner

V.

ROBERT PETER ZOOK, JR.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Robert Peter Zook, Jr., Respondent, requests that this Court deny the Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania in this Court on or about June 7, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

SUMMARY OF ARGUMENT

The Commonwealth's Petition for Certiorari should be denied. During custodial interrogation, the Respondent clearly asserted his right to counsel when he asked if he could use the phone to call his mother to see if she could get him an attorney. Under Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981) police were required to terminate the interrogation. By continuing to question the Respondent the police violated the rights guaranteed him by the Fifth and Fourteenth Amendments to the Constitution.

The decision of the Pennsylvania Supreme Court finding a clear assertion by the Respondent of his right to counsel and a violation of Edwards v. Arizona was in conformity with the established precedent of this Court. Since there was no ambiguity or equivocation in the Respondent's assertion of his rights there is no need for this Court to address the question left open by Smith v. Illinois, 469 U.S. 91, 83 L.Ed.2d 488, 105 S.Ct. 490 (1984) concerning the effect of an ambiguous assertion by an accused of his right to counsel.

ARGUMENT

The Commonwealth's Petition for Certiorari should be denied since the decision of the Pennsylvania Supreme Court in this case is controlled by this Court's decision in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981).

In Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), this Court determined that the Fifth and Fourteenth Amendments required that custodial interrogation be preceded by advice to the accused that he had the right to remain silent and the right to the presence of an attorney. Miranda also provided that if an accused requests counsel "the interrogation must cease until an attorney is present." Id. at 474, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). In Edwards v. Arizona, this Court specifically held that:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available.

Id., 451 U.S. 477, 484, 68 L.Ed.2d 378, 386, 101 S.Ct. 1880.

Edwards v. Arizona articulated a prophylactic rule designed to protect an accused in custody from being badgered by police officers. Oregon v. Bradshaw, 462 U.S. 1039, 1044, 77 L.Ed.2d 405, 411, 103 S.Ct. 2830 (1983). The prophylactic

approach constitutes a "bright line rule" that all questioning must cease after an accused requests counsel. Smith v. Illinois, 469 U.S. 91, 98, 83 L.Ed.2d 488, 495, 105 S.Ct. 490 (1984). The Edwards v. Arizona rule is based on the understanding that the assertion of the right to counsel is a significant event and that additional safeguards are necessary when the accused asks for counsel. Michigan v. Jackson, 475 U.S. 625, 636, 89 L.Ed.2d 631, 642, 106 S.Ct. 1404 (1986).

Edwards v. Arizona embodies two distinct inquiries, First, the Court must determine whether the accused actually invoked his right to counsel. Second, if the right to counsel is invoked the courts may admit his responses to further questioning only on finding that he (a) initiated further discussion with the police, and (b) knowingly and intelligently waived the right he had invoked. Smith v. Illinois, supra at 469 U.S. 95, 83 L.Ed.2d 493-494, 105 S.Ct. 490.

In the present case, Respondent was arrested for the murders of Paul Conard and Sandy Wiker. Subsequent to his arrest Respondent was given his Miranda warnings by Lieutenant Michael Landis of the Lancaster City Police Department.

Respondent waived his rights and agreed to talk with the police. Lieutenant Landis proceeded to question the Respondent concerning the offenses. During this interview the Respondent steadfastly maintained his innocence. Not being satisfied with these responses Lieutenant Landis confronted the Respondent with certain inconsistencies in his statement in an apparent effort to obtain a confession. Approximately two-thirds of the way through the interview

the Respondent "asked if he could use the phone to call his mother to see if she could get him an attorney." At the time of that request Edwards v. Arizona and Smith v. Illinois mandated that the police immediately cease questioning the Respondent. In this case however Lieutenant Landis never honored the Respondent's request for counsel and instead asked the Respondent if he meant that the police should stop questioning him until an attorney was present. This was in direct contravention of the rule of Edwards v. Arizona.

Respondent disputes the Commonwealth's contention that his request for counsel was ambiguous and equivocal. The prior decisions of this Court have given broad effect to requests for counsel that are less than all-inclusive. Connecticut v. Barrett, 479 U.S. 523, 529, 93 L.Ed.2d 920, 928, 107 S.Ct. 828 (1987). See e.g. Oregon v. Bradshaw, 462 U.S. 1039, 1041-1042, 77 L.Ed.2d 405, 410, 103 S.Ct. 2830 (1983)("I do want an attorney before it goes very much further."); Edwards v. Arizona, supra, 451 U.S. at 479, 68 L.Ed.2d at 382, 101 S.Ct. 1880. ("I want an attorney before making a deal.")

Respondent's assertion of his right to counsel was not ambiguous or equivocal. Respondent was arrested for a double homicide. Subsequently, he was advised of his rights and subjected to custodial interrogation. In his questioning, Lieutenant Landis confronted the Respondent with what he perceived were inconsistencies and weaknesses in the Respondent's exculpatory statements. In reaction to this, the Respondent asserted his right to counsel when, in the words of Lieutenant Landis, "he asked if he could use

the phone to call his mother to see if she could get him an attorney."

In determining whether there was any ambiguity in the Respondent's request this Court should examine the context in which it was made. Respondent was being subjected to custodial interrogation concerning two homicides. In this confrontational environment the Respondent desired to exercise his right to counsel. His assertion did not include the precise language that would have been used by a lawyer or a judge. Nevertheless, there can be no doubt as to the meaning of this request. Respondent desired counsel and his statement was a direct attempt on his part to articulate his intention.

There can be little doubt that the Respondent desired to speak with an attorney when he interrupted the interrogation and in a statement that was not responsive to any question indicated his desire to speak with his mother to see if she could obtain counsel for him.

The Commonwealth fragments Respondent's request in an attempt to render it ambiguous. The Court should reject this strained and hypertechnical interpretation. An ambiguity arises only when the Respondent's words understood as ordinary people would understand them are ambiguous. Connecticut v. Barrett, supra.

Respondent disagrees with the Commonwealth's assertion that the Pennsylvania Supreme Court implicitly followed a minority rule "that all questioning must cease upon any request for, or reference to counsel, however equivocal or ambiguous." (Petition for Certiorari, p. 7).

To the contrary the Pennsylvania Supreme Court specifically found that the Respondent "clearly invoked his rights under Miranda to secure counsel." Commonwealth v. Zook, ____ Pa. ____, 553 A.2d 920, 923 (1989).

In its Petition for Certiorari, the Commonwealth makes reference to the Pennsylvania Supreme Court's decision in Commonwealth v. Gibbs, ____ Pa. ____, 553 A.2d 409 (1989), cert. pending. This case should not rise or fall on the disposition by this Court of the Gibbs case. Gibbs is clearly distinguishable since it involved a response to the Miranda warnings which could be construed as ambiguous. ("Maybe I should talk to a lawyer. What good would it do me to tell you?") Further, the Pennsylvania Supreme Court based its decision on a finding that the police made an impermissible inducement and there was no finding that the rule of Edwards v. Arizona was violated.

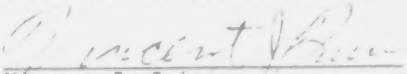
Since the police refused to terminate questioning following the Respondent's assertion of his rights, the rule of Edwards v. Arizona, required that the Respndent's statement be suppressed. The Pennsylvania Supreme Court was justified in finding a violation of Edwards v. Arizona and in reversing the judgment of the trial court and remanding for a new trial.

The decision of the Pennsylvania Supreme Court was in conformity with well-settled law as articulated by this Court in Edwards v. Arizona and Smith v. Illinois. Since the Respondent's request was neither ambiguous nor equivocal this Court will not have the opportunity in this case to address the effect of an accused's ambiguous assertion of his constitutional rights.

CONCLUSION

Respondent requests that the Commonwealth of Pennsylvania's Petition for Certiorari be denied.

Respectfully submitted,
OFFICE OF THE PUBLIC DEFENDER

BY: 

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA

Petitioner

V.

ROBERT PETER ZOOK, JR.,

Respondent

PROOF OF SERVICE - AFFIDAVIT

I, Vincent J. Quinn, Attorney for Robert Peter Zook, Jr., Respondent herein, deposes and says that on the 29th day of June, 1989, I served a copy of the foregoing Respondent's Brief in Opposition to Petition for Certiorari on Joseph C. Madenspacher, First Assistant District Attorney, Attorney for the Petitioner, Commonwealth of Pennsylvania by delivering the same to him personally in the Offices of the District Attorney for Lancaster County, located in the Courthouse, Lancaster, Pennsylvania.

OFFICE OF THE PUBLIC DEFENDER

BY: Vincent J. Quinn

Vincent J. Quinn
Chief Public Defender
Attorney I.D. 26113
Attorney for Respondent

Sworn to and subscribed before
me this 29th day of June, 1989.

Susan W. Myers
Notary Public

NOTARIAL SEAL
Susan W. Myers, Notary Public
Lancaster City, Lancaster County
My Commission Expires 10/8/91

IN THE SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF PENNSYLVANIA

Petitioner

V.

ROBERT PETER ZOOK, JR.,

Respondent

PROOF OF MAILING - AFFIDAVIT

I, Vincent J. Quinn, Attorney for Robert Peter Zook, Jr., Respondent herein, whose application for admission to the Bar of the Supreme Court of the United States is presently pending, hereby certifies that on the 30th day of June, 1989 I deposited in the United States Post Office located in Lancaster, Pennsylvania, with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of the United States within the time allowed for filing the foregoing Respondent's Brief in Opposition to Petition for Certiorari.

OFFICE OF THE PUBLIC DEFENDER

BY: Vincent J. Quinn

Vincent J. Quinn
Chief Public Defender
Attorney I.D. 26113
Attorney for Respondent

Sworn to and subscribed before me this 29th day of June, 1989.

Susan W. Myers
Notary Public

NOTARIAL SEAL
Susan W. Myers, Notary Public
Lancaster City, Lancaster County
My Commission Expires 10/6/91